IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.124 OF 2004

1. Shri Marcus D'Costa,
(Since deceased)

1A Mrs.Divina D'Costa Fernandes & Ors. .. Appellants

Vs.

Shri Anand (Anant) Bissi Gaonkar, .. Respondent

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S/Shri M.S.Sonak and D.Pangam, Advocates for the appellants.

S/Shri M.B.D'Costa, Senior Advocate with J.A. Lobo, Advocate for the respondent.

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CORAM: R.M.S.KHANDEPARKAR, J

DATED : 19TH JANUARY, 2006.

P.C.

1. The appellants in this appeal in exercise of powers under Section 100 of the Code of Civil Procedure are seeking to raise the following points as substantial questions of law arising in the matter.

1. Whether, the findings recorded in Paragraph 32 of the Impugned Judgment and Decree to the effect that “it was for the Plaintiffs to produce the matriz document showing that this property was enrolled in the matriz record in her name, but they failed to produce the same”, is ex-facie and

perverse, in as much as the matriz document was indeed produced on record, and further, the same was in the name of Julio D'Costa, who was admittedly the father of Appellant No.1 and husband of Appellant No.2 ?

2. Whether, the Ist Appellate Court was justified in not entertaining the Appellants objections to the vague findings recorded by the Learned Trial Court to the effect that the property under Matriz No.137 was subrogated to Julio D'Costa, on the ground that the Appellants herein had not filed any cross appeal against the Judgment and Decree of the Trial Court which was in their favour, in view of the law laid down by the Hon'ble Supreme Court in the case of “Ravinder Kumar Sharma V/s State of Assam ?

2. It is the contention of the learned advocate for the appellants that the lower appellate Court erred in ignoring that there was no plea raised regarding absence of identity between the suit property and the property bearing Matriz No.137. It was also sought to be contended that there was no issue involved in the matter in relation to any subrogation of right as such, and therefore, the finding on that count is totally perverse.

3. Upon hearing the learned advocates for the parties, it is seen that the lower appellate Court, after considering the entire evidence on record including all documentary evidence, has held that though the appellants have been able to prove that the appellants are the owners of the property Zorivado bearing Land Registration No.2957, the appellants have failed to establish that the said property Zorivado bearing Land Registration No.2957 corresponds to the property bearing Matriz No.137 as well as that it corresponds to the property bearing Survey No.36/1 to 6 and Survey No.140/18. The contention on behalf of the appellants is that the lower appellate Court could not have assumed that the property bearing Land Registration No.2957 does not correspond to Matriz No.137 more particularly in the absence of any pleading in that regard on behalf of the respondent. It is their further contention that there was absolutely no dispute sought to be raised in that regard in the written statement. The contention is totally devoid of substance. It is not only before the lower appellate Court but it was even before the trial Court the said issue was very much present for consideration and in fact the issues framed by the trial Court in that regard read thus:

1. Whether the plaintiffs prove that they are the owners of

the property Zorivaddo, registered under No.2957 and enrolled in matriz No.137 as described as per the boundaries in para 2 of the plaint ?

2. Whether the plaintiffs prove that the suit property has been surveyed for the purpose of Record of Rights under Survey No.36 Sub-Div.No.1, 2, 3, 4, 5, 6 and Survey No.140 Sub-Division No.18 of Cotarli Village ?

4. The lower appellate Court, on its part, framed the following points for consideration on the above issues.

1. Had the plaintiffs proved that they were the owners in possession of the property `ZORIVADO' registered under no.2957 ?
2. Had the plaintiffs proved that he said property `ZORIVADO' under Land Registration No.2957 was enrolled in the Revenue records under Matriz No.137?
3. Had the plaintiffs proved that the said property `ZORIVADO' under Land Registration No.2957 corresponds to the property under Survey No.36/1 to 6 and Survey No.140/18 ?

5. Obviously, the lower appellate Court framed two points in relation to first issue framed by the trial Court. The Point No.3 framed by the lower appellate Court corresponds to Issue No.4 in the trial Court. The issues in the trial court clearly disclosed that the parties were required to satisfy the Court that the property bearing Land Registration No.2957 corresponds to the property bearing Matriz No.137 and further it corresponds to Survey No.36/1 to 6 and Survey No.140/18. Merely because the trial Court had clubbed the first two points, which are framed by the lower appellate Court in Issue No.1, nevertheless, the parties did understand that the identity of the property bearing Land Registration No.2957 was in dispute to the extent it was claimed by the appellants to be corresponding to the property bearing Matriz No.137 and Survey No.36/1 to 6 and Survey No.140/18. Being so, the contention that because there was no clear plea raised in that regard therefore the issue did not arise, such contention having not raised in time either before the trial Court or before the lower appellate Court, it is too late for the appellants to raise such contention to seek interference in the impugned judgment in exercise of powers under Section 100 of the Code of Civil Procedure. The parties being fully aware of the nature of the

controversy and the issues which were required to be considered, proceeded to lead evidence accordingly. Merely because inspite of having succeeded at trial Court, failed to establish the case at lower appellate Court, the party cannot be allowed to raise such issue for the first time at the stage of the second appeal.

6. As regards the point regarding subrogation, as rightly submitted by the learned advocate for the respondent, proper analysis of voluminous documents placed on record clearly disclose that Julio Mateus D'Costa had infact acquired such right on account of payment of land revenue and that being the matter of record clearly revealed from the documents produced by both the parties and having those documents considered by the trial Court as well as the lower appellate Court, for the purpose of arriving at the appropriate finding regarding the identity of the property referred to in those documents and has arrived at the finding in relation thereto, it cannot be said that in the absence of issue being framed in that regard, the Court has committed any error in exercise of jurisdiction or has committed any sort of illegality in the matter of appreciation of evidence or arriving at the conclusion based on the appreciation of the evidence. Mere absence of issue in that regard, when the said point was directly linked to the issue already framed regarding

identity of the property, cannot be a justification for interference in the impugned judgment in exercise of powers under Section 100 of the Code of Civil Procedure and more particularly when the findings arrived at by the lower appellate Court are clearly revealed to be on the analysis of the entire evidence on record in proper perspective.

7. In fact, the inventory proceedings based on which the appellants claim to have derived title to the property disclose a reference to the Matriz No.139 to be corresponding to the property bearing Land Registration No.2957. It is sought to be contended that there was a mistake in recording the said matriz number in the inventory proceedings. To a specific query as to whether the matriz certificate in relation to Matriz No.139 was produced on record or not, no satisfactory reply could be received from the appellants. In any case, in the absence of any satisfactory explanation as to how the inventory proceedings referred to Matriz No.139 to be corresponding to the property bearing Land Registration No.2957, and considering the other documents, to which both the advocates have extensively referred to in the course of hearing of the matter, it is obvious that the findings of the lower appellate Court cannot be found fault with under any circumstances. Being so, there is absolutely no case for interference in the judgment of the lower appellate Court in exercise

of power under Section 100 of the Code of Civil Procedure and hence the appeal fails and accordingly is hereby rejected, as it does not give rise for consideration of any substantial question of law in the present appeal.

(R.M.S.KHANDEPARKAR, J)